

No. 11, Original

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**In The  
Supreme Court of the United States**

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STATE OF NEW JERSEY,

*Plaintiff,*

v.

STATE OF DELAWARE,

*Defendant.*

---

**MOTION TO REOPEN AND FOR A SUPPLEMENTAL  
DECREE, PETITION, BRIEF AND APPENDIX IN  
SUPPORT OF MOTION**

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**MOTION TO REOPEN AND FOR  
A SUPPLEMENTAL DECREE**

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Comes now the State of New Jersey, by and through the Attorney General of the State of New Jersey, Peter C. Harvey, and respectfully asks the Court to reopen this matter and issue a supplemental decree in accordance with the Petition submitted herewith.

PETER C. HARVEY  
Attorney General

July 28, 2005  
Please address all  
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**PETITION FOR SUPPLEMENTAL DECREE**

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The State of New Jersey, by and through its Attorney General, Peter C. Harvey, petitions this Court for a Supplemental Decree, and, in support of this petition, states as follows:

**Jurisdiction of This Court**

1. Pursuant to paragraph 5 of the 1935 Decree, this Court “retains jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree. . . .” 295 U.S. 694, 698 (1935).

2. Original jurisdiction is also proper here pursuant to Article III, Section 2, Clause 2, of the Constitution of the United States and 28 U.S.C. § 1251(a).

3. The filing of this Petition has been authorized by the Acting Governor and by the Attorney General of New Jersey.

### **Introduction**

4. This is a petition for a Supplemental Decree declaring that Article VII of the Compact of 1905 between the State of New Jersey and the State of Delaware grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware. The State of New Jersey also seeks to enjoin the State of Delaware from requiring permits for the construction of any improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, and from enforcing any conditions attached to such permits.

### **Background**

5. Prior to the 1934 decision in this case, the States of New Jersey and Delaware had disputed the location of their common boundary “almost from the beginning of statehood.” *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). New Jersey consistently claimed that its title extended to the middle of the main shipping channel along the entire length of the Delaware River and Bay opposite the State of Delaware. In the lower River and Bay, below the twelve-mile radius from New Castle, Delaware (the “Twelve-Mile Circle”), Delaware claimed that its title extended to the geographical center of the River. Within the Twelve-Mile Circle, however, Delaware claimed that its title

extended to the low-water mark on the New Jersey shoreline. Delaware traced that title to a deed of feoffment and lease on August 24, 1682 from the Duke of York to William Penn. *Id.* at 364.

6. The validity of Penn's title was challenged not only during colonial times, but by the State of New Jersey following Independence. *Id.* at 369-70.

7. In 1877, New Jersey was granted leave by this Court to file a Bill of Complaint against Delaware to determine the boundary between the States in the Delaware River. (No. 1, Orig.) The suit was initiated after Delaware attempted to enforce its fishing laws against New Jersey fishermen. On March 26, 1877, following oral argument, the Court entered a preliminary injunction restraining Delaware "from imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey . . . for right or authority to fish in the river Delaware, as they have heretofore been accustomed . . . until this court shall make other order to the contrary." (Record, No. 1, Orig., at 53-54.) The Court's order recited that "for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same . . ." (*Id.* at 53.)

8. With the preliminary injunction in place, the case "slumbered for many years." 291 U.S. at 377. In 1903, however, in order to settle the then-pending dispute, commissioners appointed by both States negotiated the text of what later became the Compact of 1905. New Jersey ratified the Compact on April 8, 1903, 1903 N.J. Laws ch. 243, p.515 (Record, No. 11, Orig., Pl. Ex. 161 at 30), but the Delaware legislature failed to approve it. In February 1905,

both States re-appointed commissioners. 23 Del. Laws ch. 216 (1905) (Record, No. 11, Orig., Pl. Ex. 162 at 13); 1905 N.J. Laws ch. 42, p.67 (Record, No. 11, Orig., Pl. Ex. 161 at 32). They met in Philadelphia on February 18, 1905 and quickly agreed to the same provisions as in 1903 (*Id.*, Pl. Ex. 161 at 33-34). Delaware approved the Compact on March 20, 1905. 23 Del. Laws ch. 5 (1905) (Record, No. 11, Orig., Pl. Ex. 162 at 14-15). New Jersey did so the next day. 1905 N.J. Laws ch. 42, p.67 (Record, No. 11, Orig., Pl. Ex. 161 at 35). Congress ratified the Compact on January 24, 1907. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907).

9. Of particular importance to the present controversy is Article VII of the Compact of 1905, which provides:

Article VII. Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

10. Following ratification of the Compact by Congress, New Jersey's suit was dismissed without prejudice. 205 U.S. 550 (1907).

11. Although the 1905 Compact resolved numerous jurisdictional issues, it did not settle the boundary line. In 1925, a dispute arose over the ownership of an oyster bed in the Delaware Bay south of the Twelve-Mile Circle. The States were again unable to resolve the dispute, which had been left open by Article VI of the Compact of 1905. In 1927, this Court again granted New Jersey leave to file suit to determine the line along the entire boundary, both within and below the Twelve-Mile Circle ("*New Jersey v.*

*Delaware II*”). (No. 11, Orig.) The Court appointed a Special Master, who submitted his report on October 9, 1933. The Report of the Special Master is reported at 55 S. Ct. 934 (1933). Both States filed exceptions.

12. On February 5, 1934, the Court issued an opinion confirming the Special Master’s report. 291 U.S. at 385. As to that portion of the River within the Twelve-Mile Circle, the Court set the boundary at the mean low-water line on the New Jersey shore, “subject to the Compact of 1905.” *Id.* As to the boundary in the lower River and Bay, the Court set the line in the middle of the main shipping channel. *Id.*

13. New Jersey does not dispute the location of its boundary with the State of Delaware. However, that boundary is subject to the Compact of 1905.

14. Paragraph 5 of the 1935 Decree provided that this Court “retains jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree.” 295 U.S. at 698. Paragraph 6 provided that “the State of Delaware, its officers, agents, and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction, and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree. . . .” and the State of New Jersey was similarly enjoined. *Id.* at 698-99. Paragraph 7 provided that the Decree was “without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . .” *Id.* at 699.

### **New Jersey's Riparian Jurisdiction Within the Twelve-Mile Circle**

15. The State of New Jersey, since the 1800's, has exercised riparian jurisdiction and regulated its riparian lands on its own side of the Delaware River, including within the Twelve-Mile Circle.

16. Between 1854 and 1871, the New Jersey Legislature enacted five separate grants within the Twelve-Mile Circle for the construction of various piers and wharves extending from the New Jersey shore beyond the low-water mark into the Delaware River. 1854 N.J. Laws ch. 143, p.375 (Record, No. 11, Orig., Pl. Ex. 41); 1855 N.J. Laws ch. 109, p.274 (Record, No. 11, Orig., Pl. Ex. 42); 1870 N.J. Laws ch. 131, p.346 (Record, No. 11, Orig., Pl. Ex. 48); 1870 N.J. Laws ch. 344, p. 726 (Record, No. 11, Orig., Pl. Ex. 44); 1871 N.J. Laws ch. 307, p.758 (Record, No. 11, Orig., Pl. Ex. 43).

17. Beginning in 1883, also within the Twelve-Mile Circle, the New Jersey Board of Riparian Commissioners, and later its successor agencies, issued numerous riparian grants to private owners for submerged lands and structures extending below the low-water mark into the Delaware River. (*See* Report of the Special Master at 52, citing Pl. Exs. 57-92, 94-97).

18. On at least eight occasions from 1854 to 1905, the State of New Jersey approved riparian grants extending below the mean low-water line in the Twelve-Mile Circle. These grants also authorized the building of riparian structures on lands extending beyond the low-water line. From 1905 to the present, on at least thirty-three occasions,



New Jersey similarly issued riparian grants extending below the mean low-water line within the Twelve-Mile Circle.

19. In its briefs and arguments in *New Jersey v. Delaware II*, Delaware repeatedly acknowledged both the right of New Jersey citizens to wharf out to navigable water within the Twelve-Mile Circle, and the exclusive right of New Jersey to regulate the exercise of those riparian rights. For instance, in its Reply Brief to the Special Master, Delaware stated: “Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights.” (Reply Brief of the Defendant Before the Special Master at 9 (Bound Volume 15).) Delaware further conceded New Jersey’s exclusive regulatory authority over such rights in its oral argument before the Special Master:

We say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 ceded to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do. (Argument of Clarence A. Southerland, Esq. for Delaware, Oral Argument Before the Special Master, September 12, 1932, at 91 (Bound Volume 15).)

Mr. Southerland, Delaware’s counsel, served as the Attorney General of Delaware from 1925 to 1929, and as the first Chief Justice of the Supreme Court of Delaware from 1951 to 1963.

20. On or about December 2, 1957, S. Samuel Arsht, Esq., counsel to the Delaware State Highway Department, advised the Department that it was his opinion that, pursuant to the 1905 Compact and this Court's decision in No. 11, Orig., the State of Delaware did not have jurisdiction over the construction of improvements appurtenant to the New Jersey side of the River within the Twelve-Mile Circle. Acting on that advice, the Delaware State Highway Department adopted a resolution on December 11, 1957, directing its Chief Engineer to notify the U.S. Army Corps of Engineers that "while the Department has no jurisdiction over the area mentioned, the Department wishes to be notified of all permits requested and granted." The Delaware State Highway Department notified the U.S. Army Corps of Engineers on or about December 13, 1957, that "[a]t the December 11<sup>th</sup> meeting of the Delaware State Highway Department it was determined that the Corps of Engineers be requested to continue to supply the Delaware State Highway Department with information regarding proposed work in, on, or under the Delaware River on the New Jersey side provided, however, that no permit of the Corps of Engineers be held up or otherwise delayed by failure of the Delaware State Highway Department to act upon it." The letter advised, by contrast, that "[i]f any work is contemplated or requested on the Delaware side, then, of course, no permits should be issued without approval of the Delaware State Highway Department."

### **The Present Controversy**

21. Delaware currently has two State permitting requirements applicable to waterway construction activities in Delaware waters. Both permit programs are administered

by the Delaware Department of Natural Resources and Environmental Control (“DNREC”).

22. In 1971, Delaware adopted the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (2005) (the “DCZA”). The DCZA declares that it is Delaware’s policy “to prohibit entirely the construction of new heavy industry in its coastal areas, which industry is determined to be incompatible with the protection of that natural environment in those areas.” *Id.* § 7001. The DCZA provides that certain uses are “absolutely prohibited” in the Delaware coastal zone. *Id.* § 7003. It forbids “[h]eavy industry uses of any kind” as well as any “offshore gas, liquid or solid bulk product transfer facilities” that were “not in operation on June 28, 1971.” *Id.* The Port of Wilmington is exempted from the prohibition on “bulk product transfer facilities.” *Id.* § 7002(f). Industrial development other than that of heavy industry requires a permit issued by the Secretary of DNREC. *Id.* § 7004. Persons who violate the DCZA are subject to a fine of up to \$50,000 per day for each day of the violation. *Id.* § 7011.

23. On December 13, 1991, DNREC issued a DCZA permit to Keystone Cogeneration Systems, Inc., now known as Logan Generating Company, L.P. (“Logan”), to construct a 1550-foot pier and water intake structure in the Delaware River to service a 225-MW coal fired power plant in New Jersey. Since 1991, to New Jersey’s knowledge the only other applicant for a DCZA permit for the construction of an improvement appurtenant to the New Jersey shore has been Crown Landing, LLC, *infra*.

24. In 1986, Delaware enacted the Subaqueous Lands Act, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (2005) (the “DSLAs”). The DSLA provides that “[n]o person shall deposit material upon

or remove or extract materials from, or construct, modify, repair or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval from the Department.” *Id.* § 7205(a). The DSLA also provides “[t]here shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned subaqueous lands.” *Id.* § 7210. Violations of the DSLA are punishable by civil fines and criminal penalties. *Id.* § 7214.

25. To date, the DSLA has been applied to only a limited number of projects on the New Jersey side of the River. DNREC issued a DSLA permit to Logan on September 30, 1991 for the pier and water intake structure mentioned above. In March 2005, DNREC approved a DSLA permit for Fenwick Commons, LLC, for the renovation of a marina and piers appurtenant to “The Riverwalk at Penns Grove,” a 12-acre redevelopment project in the Borough of Penns Grove, Salem County, New Jersey, discussed, *infra*.

26. On September 16, 2004, Crown Landing, LLC submitted an application to the Federal Energy Regulatory Commission (“FERC”) to construct and operate a liquefied natural gas import terminal and re-gasification facility in Logan Township, Gloucester County, New Jersey. This project requires a pier appurtenant to the New Jersey shoreline that would extend approximately 2,000 feet beyond the mean low water line into the Delaware River on the New Jersey side of the main channel within the Twelve-Mile Circle.

27. The New Jersey Board of Public Utilities has advised FERC that the Crown Landing project should “play an important part in ensuring a competitive and reliable

supply of natural gas to New Jersey's and the region's energy customers.”

28. On October 29, 2004, DNREC declined to issue a DSLA permit for the pier until Crown Landing first obtained a DCZA permit.

29. Accordingly, on December 7, 2004, Crown Landing submitted to the Secretary of DNREC a request for a status decision that the Crown Landing pier was permitted by the DCZA. On February 3, 2005, the Secretary concluded that the Crown Landing project represented both an “offshore bulk transfer facility” as well as a “heavy industry use” that were specifically prohibited by the DCZA. The Secretary also concluded -- with reference to structures located entirely within the State of New Jersey -- that “the on-shore storage tanks essential to the operation of the facility are prohibited structures.”

30. Crown Landing appealed the Secretary's decision to the Delaware State Coastal Zone Industrial Control Board, pursuant to Del. Code Ann. tit. 7, § 7007 (2005). That Board affirmed the Secretary's determination on March 31, 2005. That determination has now become final.

31. Delaware's imposition of a permit requirement for the Crown Landing project violates New Jersey's rights under Article VII of the Compact of 1905 because it interferes with New Jersey's exclusive State riparian jurisdiction over riparian improvements appurtenant to the New Jersey shore of the Delaware River.

32. On July 13, 2004, Fenwick Commons, LLC, applied to DNREC for a Subaqueous Lands Lease and Water Quality Certification to refurbish a 750-foot long pier and

other structures, and to fill 1,882 square feet of tidal lands at Penns Grove, Salem County, New Jersey. Fenwick Commons notified Delaware on May 6, 2005, that “financing considerations” compelled it to obtain the Delaware permit in order to proceed with the project. But Fenwick Commons nonetheless stated: “the issue as to ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey . . . Our position is that we will leave the issue of riparian rights and Delaware ownership to be resolved at a different time and in a different for[u]m.” On May 10, 2005, DNREC approved a Subaqueous Lands Lease to Fenwick Commons, L.L.C. The lease has a term of twenty years and is renewable.

33. The Fenwick Commons pier occupies lands that were the subject of: an act of the State of New Jersey 150 years ago incorporating the Pennsgrove Pier Company (1855 N.J. Laws ch. 109, p. 274); a New Jersey tidelands grant dated March 21, 1916 (recorded in Salem County, New Jersey, in Deed Book 130, page 383); and a New Jersey tidelands grant to French’s Hotel Company dated October 17, 1921 (recorded in Salem County, New Jersey, in Deed Book 166, page 330). The taxability of this granted area by the municipality of Penns Grove in New Jersey was the subject of the New Jersey Superior Court Chancery Division’s decision in *Main Associates, Inc. v. B & R Enterprises, Inc.*, 74 N.J. Super. 483, 181 A.2d 541 (Ch. Div. 1962). The pier is taxed by the Borough of Penns Grove, and depicted on its tax maps as Block 57, Lot 6. In *State of New Jersey v. Federanko*, 26 N.J. 119, 139 A.2d 30 (1958), the Supreme Court of New Jersey upheld the authority of New Jersey to exercise criminal jurisdiction over gambling offenses committed on this pier. In sum, New Jersey has asserted jurisdiction over this specific structure by legislative action in 1855, by executive actions in 1916 and 1921, and by judicial actions in 1958 and 1962.

34. Delaware's requirement that Fenwick Commons obtain a Subaqueous Lands Lease violates the terms of the Compact of 1905, which protected New Jersey's rights to exercise riparian jurisdiction of every kind and nature on its side of the Delaware River, and to make grants, leases, and conveyances of riparian lands. Further, this Lease purports to assess a fee for the filling of lands on the New Jersey side of the Delaware River. New Jersey's prior approval for the filling of any riparian lands has been required since 1891. N.J. Stat. Ann. § 12:3-4 (1979). New Jersey's review of applications to allow such filling has been a part of its exercise of riparian jurisdiction since the Wharf Act of 1851, and the 1891 prohibition on filling of riparian lands without its approval. Delaware's 2005 lease interferes with New Jersey's riparian jurisdiction and its riparian grants to Fenwick Commons, in violation of Article VII of the Compact of 1905.

35. Because of its irregular shape, New Jersey's shoreline within the Twelve-Mile Circle along the Delaware River is approximately 29 miles long. Six municipalities and two counties of New Jersey have boundaries within this area: Logan Township, Gloucester County and Oldmans Township, Penns Grove Township, Carneys Point Township, Pennsville Township and Elsinboro Township, all in Salem County.

36. Delaware's exercise of riparian jurisdiction on the New Jersey side of the River within the Twelve-Mile Circle interferes with New Jersey's sovereign right under the Compact of 1905 to regulate the riparian rights of its own citizens in this area, and has effectively blocked the Crown Landing project. Delaware's continued interference with the exercise of New Jersey's riparian jurisdiction may

discourage economic development along this part of New Jersey's shoreline.

37. The State of New Jersey owns riparian shoreline within the Twelve-Mile Circle. Thus, Delaware's actions also threaten the construction of projects by the State of New Jersey itself within the Twelve-Mile Circle.

38. Income from New Jersey's riparian lands program has been dedicated to New Jersey's Fund for the Support of Free Public Schools since at least 1898. N.J. Stat. Ann. § 18A:56-5 and -6 (1999). Over the long term, a negative effect on development along the New Jersey shoreline within the Twelve-Mile Circle will diminish the income received by the State of New Jersey for conveyances and leases of riparian lands and will reduce the income received by the State's School Fund.

39. Delaware's regulation of riparian improvements on the New Jersey side of the River within the Twelve-Mile Circle conflicts with Article VII of the Compact of 1905 and interferes with the rights reserved to New Jersey by paragraph 7 of the 1935 Decree. Even in the absence of the Compact, Delaware's exercise of authority under the DCZA to prohibit entire categories of riparian activity that New Jersey may choose to allow would violate New Jersey's rights under federal common law.

#### **Attempts to Resolve This Matter**

40. The Federal Coastal Zone Management Act ("FCZMA") was enacted in 1972 to encourage cooperation between federal, state and local coastal zone management activities, but does not modify or supersede any interstate compact. 16 U.S.C. §1452(4),(5); 16 U.S.C. §1456(e)(1). After enactment of the FCZMA, New Jersey prepared its



own coastal zone management plan in 1978 and 1980, in which it recognized potential conflicts that could arise with Delaware over regulation of projects within the Twelve-Mile Circle and the need for coordination between the States for such projects. For a period of time in the early 1990s, New Jersey and Delaware sought a means for resolving these potential conflicts through a formal agreement. However, New Jersey abandoned its efforts to reach a formal agreement in 1994, based on concerns that such an agreement would create an overly cumbersome approval process and would give Delaware effective veto power over projects on the New Jersey side of the Delaware River.

41. Recently, New Jersey state officials have sought without success to persuade Delaware that its exercise of riparian jurisdiction on the New Jersey side of the River violates Article VII of the Compact of 1905. On April 11, 2005, following informal efforts to reach a settlement, Paul T. Fader, the Chief Counsel to the Acting Governor of New Jersey, Richard J. Codey, formally advised Delaware that, under the Compact of 1905, “Delaware does not have jurisdiction over the construction of this project or any project appurtenant to New Jersey’s shoreline.”

42. Delaware responded by letter dated May 9, 2005, from Joseph C. Schoell, Legal Counsel to the Governor of Delaware, Ruth Ann Minner. Delaware rejected New Jersey’s contentions and claimed that the Compact of 1905 limited New Jersey’s riparian jurisdiction solely to New Jersey’s territory above the low water mark on the New Jersey shore.

43. Other efforts to resolve the dispute have proven futile. For instance, on May 2, 2005, the New Jersey State Assembly unanimously adopted a resolution urging the Governor and General Assembly of Delaware to amend the

DCZA to make clear that it “does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact.” A. Res. 260, 211th Leg. (N.J. 2005). The identical resolution is currently pending in the New Jersey Senate. S. Res. 100, 211th Leg. (N.J. 2005).

44. On June 27, 2005, thirty-one New Jersey legislators introduced a bill requiring that New Jersey state pension funds be withdrawn from Delaware banks unless Delaware conforms its permitting laws to respect New Jersey’s rights under the 1905 Compact. State of New Jersey Assembly Bill No. A4287.

45. Delaware has refused to change its position in response to these initiatives. Instead, on June 29, 2005, two Delaware legislators responded by introducing legislation authorizing the Governor to call on the National Guard of Delaware to remove any “encroachments” upon Delaware’s boundary. State of Delaware House of Representatives Bill No. 296. Thus, notwithstanding its statements before this Court in the 1930s, Delaware has refused to acknowledge that the Compact of 1905 grants New Jersey exclusive riparian jurisdiction on the New Jersey side of the Delaware River within the Twelve-Mile Circle.

### **Prayer for Relief**

Wherefore, the State of New Jersey prays that the Court enter a Supplemental Decree:

1. Declaring that Article VII of the Compact of 1905 between the State of New Jersey and the State of Delaware grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New

Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware;

2. Enjoining the State of Delaware from requiring permits for the construction of any improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, and further enjoining Delaware from enforcing any conditions attached to any such permits; and

3. Awarding the State of New Jersey such other relief as the Court deems just and proper.

Respectfully submitted,

Peter C. Harvey  
Attorney General of New Jersey

July 28, 2005

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**BRIEF IN SUPPORT OF MOTION TO REOPEN  
AND FOR A SUPPLEMENTAL DECREE**

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## QUESTION PRESENTED FOR REVIEW

The Compact of 1905 between the States of New Jersey and Delaware established the States' respective jurisdiction over the Delaware River, but not the boundary line between them. With respect to jurisdiction over riparian rights, Article VII of the Compact provided that:

Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States.

Nearly three decades later, this Court settled the boundary line, which had been previously disputed by Delaware and New Jersey “almost from the beginning of statehood.” *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). As to the boundary within the twelve-mile circle of New Castle, Delaware (the “Twelve-Mile Circle”), the Court established the line at the mean low-water mark on the New Jersey shore, “subject to the Compact of 1905.” *Id.* at 385. Paragraph 7 of the 1935 Decree provided that it was “without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . .” 295 U.S. 694, 699 (1935).

The question presented here is whether the Compact of 1905 grants New Jersey exclusive State riparian jurisdiction over improvements appurtenant to the New Jersey side of the Delaware River within the Twelve-Mile Circle, free from regulation by Delaware.

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2. Decree, *New Jersey v. Delaware*, Orig. No. 11, June 3, 1935, 295 U.S. 694 (1935) . . . . . 8a
3. Letter of Paul T. Fader, Chief Counsel to Acting Governor of New Jersey Richard J. Codey, to Joseph Schoell, Legal Counsel to Governor of Delaware Ruth Ann Minner, dated April 11, 2005 . . . . . 17a
4. Letter of Joseph C. Schoell, Legal Counsel to Governor Of Delaware Ruth Ann Minner, to Paul T. Fader, Chief Counsel to Acting Governor of New Jersey Richard J. Codey, dated May 9, 2005 . . . . . 21a
5. Affidavit of Richard Castagna, dated June 27, 2005 . . . . . 25a
6. Affidavit of Richard Castagna, Exhibit A- Map of New Jersey Riparian Grants Extending Beyond Mean Low Water Line Within the Twelve Mile Circle Of New Castle . . . . . 54a
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No. 11, Original

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**In The  
Supreme Court of the United States**

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STATE OF NEW JERSEY,

*Plaintiff,*

v.

STATE OF DELAWARE,

*Defendant.*

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**BRIEF IN SUPPORT OF MOTION TO REOPEN  
AND FOR A SUPPLEMENTAL DECREE**

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**INTRODUCTION**

The State of New Jersey submits this brief in support of its motion to reopen No. 11, Original, in order to obtain a supplemental decree enforcing New Jersey's sovereign rights under the Compact of 1905 with the State of Delaware. New Jersey is not disputing the location of the boundary between the States, which this Court decided in 1934. That boundary decision, however, was made expressly subject to the Compact of 1905. Accordingly, New Jersey seeks a declaration that the Compact of 1905 grants New Jersey exclusive riparian jurisdiction over waterfront improvements extending from the New Jersey shoreline into the Delaware River within an area known as the Twelve-Mile Circle.<sup>1</sup> New Jersey further seeks to restrain Delaware from asserting

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<sup>1</sup> The Twelve-Mile Circle refers to an area encompassed by a circle centered at New Castle, Delaware, that was the subject of a conveyance from the Duke of York to William Penn in 1682. *See New Jersey v. Delaware*, 291 U.S. 361, 364 (1934).

riparian jurisdiction over such improvements on New Jersey's side of the River.

## **JURISDICTION**

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States, 28 U.S.C. § 1251(a), and paragraph 5 of the 1935 Decree in No. 11, Original, 295 U.S. 694, 698 (1935).

## **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

United States Constitution, Art. III, § 2, cl. 2:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

28 U.S.C. § 1251(a), Original Jurisdiction:

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

Article VII of the Compact of 1905:

Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907). (App. 5a.)

## SUMMARY OF ARGUMENT

Until this Court settled the boundary line in 1934, New Jersey and Delaware had disputed the location of the boundary almost since their formation as independent States. *New Jersey v. Delaware*, 291 U.S. 361, 376 (1934). In 1905, while the first boundary suit was pending (No. 1, Orig.), the States entered into a Compact that settled their jurisdictional disputes while leaving the boundary line unresolved. This Court ultimately settled the line in 1934, *id.* at 385, and entered its decree in 1935, 295 U.S. at 694 (“Decree”) (App. 8a). Within the Twelve-Mile Circle, the Court established the boundary at the mean low-water line on the New Jersey side, “subject to the Compact of 1905.” 291 U.S. at 385.<sup>2</sup> The Decree was made “without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . .” 295 U.S. at 699.

Article VII of the 1905 Compact clearly protects New Jersey’s right to regulate waterfront improvements extending from the New Jersey shoreline into the Delaware River within the Twelve-Mile Circle. In fact, in the proceedings before the Court and the Special Master, Delaware conceded that the 1905 Compact expressly reserved New Jersey’s exclusive right to exercise riparian jurisdiction on its side of the Delaware River. Consistent with this understanding of the 1905 Compact, after the boundary line was settled, New Jersey continued to exercise riparian jurisdiction on its side of the Delaware River east of the main channel.

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<sup>2</sup> The “low-water mark” of a river is defined as “the point to which the water recedes at its lowest stage.” Black’s Law Dictionary 1623 (8th ed. 2004).

In March 2005, for the first time, Delaware invoked its laws to block the construction of a pier on the New Jersey side of the Delaware River. Delaware has also recently applied its state permitting laws to other projects on the New Jersey side, including an historic pier in Penns Grove, New Jersey, on riparian lands granted by New Jersey in 1916 and 1921.

New Jersey has protested Delaware's assertions of jurisdiction, but its efforts to resolve this conflict amicably have been unsuccessful. Accordingly, New Jersey seeks to reopen No. 11, Original, pursuant to paragraph 5 of the 1935 Decree, in order to obtain a supplemental decree clarifying New Jersey's rights and enjoining Delaware from asserting riparian jurisdiction over proposed waterfront improvements on New Jersey's side of the Delaware River within the Twelve-Mile Circle.

The Court should exercise its continuing jurisdiction under the 1935 Decree to resolve this dispute. The controversy is grave and important. Its resolution will determine whether New Jersey can exercise its sovereign right to regulate the riparian rights of its own citizens along its own shoreline within the Twelve-Mile Circle, free of regulation by Delaware. The answer also will determine whether Delaware can interfere with New Jersey's regulation of growth and development in this area. No alternative forum exists to resolve this issue, and only this Court can interpret the 1905 Compact in a manner that will bind its signatories.

The plain language of the 1905 Compact expressly confirmed that New Jersey would be able to exercise exclusive State riparian jurisdiction over structures on its own side of the Delaware River. Article VII provided that

each State, “on its *own* side of the river,” may “*continue*” to exercise “*riparian jurisdiction of every kind and nature*” under the “laws of the *respective* states” (emphasis added.) These words demonstrate that such “riparian jurisdiction” would be interpreted broadly and that each State would be able to exercise exclusive “riparian jurisdiction” on its side of the River. The use of the word “continue” is also significant. Long before the Compact of 1905, New Jersey regulated riparian grants and improvements on its side of the River, including within the Twelve-Mile Circle. New Jersey continued to do so after the Compact of 1905. And it is only relatively recently that Delaware has attempted to interfere with New Jersey’s exercise of its riparian jurisdiction.

Because the Compact is clear and unambiguous, it is unnecessary to appoint a special master. New Jersey respectfully submits that the case should be briefed, argued, and decided in the October 2005 term.

## STATEMENT OF THE CASE

### A. *New Jersey v. Delaware I* and the Compact of 1905.

The Compact of 1905 resulted from a dispute over the States’ competing claims of sovereignty and jurisdiction in the Delaware River. In 1871, Delaware enacted a law that required non-residents to obtain a Delaware license to fish in the River. (Record, No. 11, Orig., Pl. Ex. 161 at 10.) When Delaware arrested New Jersey fishermen pursuant to this law in 1872, New Jersey’s Governor protested this infringement upon the State’s authority and issued a proclamation asserting New Jersey’s claim to jurisdiction over the eastern half of the Delaware River. (*Id.* at 7, 10.)

When the States' efforts to settle the dispute proved unsuccessful, New Jersey filed suit here to determine the boundary line in the Delaware River. (*Id.* at 23-25.) This Court granted New Jersey leave to file a bill of complaint (“*New Jersey v. Delaware I*”) (Record, No. 1, Orig., at 5), and issued a preliminary injunction restraining Delaware “from imposing any tax, assessment or imposition whatsoever, by way of license fee or otherwise, upon any citizen or resident of the State of New Jersey . . . for right or authority to fish in the river Delaware, as they have heretofore been accustomed . . . until this court shall make other order to the contrary.” (*Id.* at 53-54.) This Court’s preliminary injunction order explained that “for a long period of time, to wit, more than seventy years last past, the State of New Jersey has claimed and exercised jurisdiction over the easterly portion of the river Delaware to the middle of the same . . . .” (*Id.* at 53.)

With the preliminary injunction in place, the case lingered for over twenty-five years until, in 1903, the States appointed commissioners to resolve the dispute. (Record, No. 11, Orig., Pl. Ex. 161 at 25-33.) The commissioners met in Philadelphia on March 12 and 14, 1903, and they negotiated the text of what later became the Compact of 1905. (*Id.* at 29-31.)

The Compact did not establish the boundary line, but it did resolve numerous jurisdictional issues. The Compact established the authority of each State to serve criminal and civil process on the River (Articles I, II). (App. 2a-3a.) It addressed common fishing rights and laws (Articles III-VI). (App. 3a-5a.) Article VII, at issue in this case, specifically confirmed each State’s riparian rights and jurisdiction to regulate such rights. (App. 5a.)

Article VIII of the Compact provided: “[n]othing herein contained shall affect the territorial limits, rights or jurisdiction of either State of, in, or over the Delaware River, or the ownership of the subaqueous soil thereof, except as herein expressly set forth.” (App. 5a.)

Article IX provided that, once approved by the States and ratified by Congress, the Compact “shall be and become binding in perpetuity upon both of said States; and thereupon the suit now pending in the Supreme Court . . . shall be discontinued . . . without prejudice.” (App. 6a.)

In describing the Compact to the New Jersey Legislature, the New Jersey commissioners stated:

[W]hile it was not found practicable to settle the exact geographical boundary line between the two States, nevertheless every interest of the State of New Jersey has been protected, all its riparian, fishery and other rights and jurisdiction thoroughly safeguarded and every question of practical difficulty between the two States settled for all time. (Record, No. 11, Orig., Pl. Ex. 161 at 29.)

Although Delaware initially failed to approve the Compact, the States reappointed commissioners and, in 1905, quickly agreed to the same provisions as in 1903. (Record, No. 11, Orig., Pl. Ex. 161 at 32-34, Pl. Ex. 162 at 13-15.) Delaware approved the Compact on March 20, 1905, 23 Del. Laws ch. 5 (1905), and New Jersey did so the next day, 1905 N.J. Laws ch. 42, p.67. Congress ratified the Compact on January 24, 1907, with the proviso that “nothing contained therein shall be construed to impair or in any manner affect any right or jurisdiction of the United States in

and over the islands or waters which form the subject of said agreement.” Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907). *New Jersey v. Delaware I* was then dismissed without prejudice. 205 U.S. 550 (1907).

## **B. New Jersey’s Exercise of Riparian Jurisdiction.**

New Jersey has regulated its riparian lands, including within the Twelve-Mile Circle, since the 1800s. Before 1851, State riparian lands were regulated primarily through local custom. (*See Castagna Aff.* ¶ 3, App. 28a.)<sup>3</sup> In 1851, the Legislature enacted the Wharf Act, which required riparian landowners to obtain permission from their counties for development that would extend past the mean low-water line. 1851 N.J. Laws 335. The Wharf Act also provided that such permission could not be granted if the development would hinder navigation. *Id.* Then, in 1864, the Legislature created the Board of Riparian Commissioners, the earliest predecessor to the current Tidelands Resource Council. N.J. Stat. Ann. § 12:3-1 (1979) (enacted in 1864). The Board subsequently was authorized and directed to set bulkhead and pierhead lines in certain areas of the State. N.J. Stat. Ann. § 12:3-2 (1979) (enacted in 1869). In 1871, the Board’s authority was expanded to encompass all tidal waters of the State, and included authority over approval of grants or leases of State riparian interests. N.J. Stat. Ann. § 12:3-10 (1979) (enacted in 1871).

Since its formation, the Tidelands Resource Council and its predecessors have determined whether to convey riparian lands or rights and have imposed regulatory conditions on such conveyances. (*See Castagna Aff.* ¶¶ 6, 7,

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<sup>3</sup> “Castagna Aff.” refers to the Affidavit of Richard Castagna in Support of Motion To Reopen And For A Supplemental Decree, found at App. 25a.



App. 28a, 29a.) In 1914, the Legislature enacted the Waterfront Development Law. N.J. Stat. Ann. § 12:5-3 (1979). The law required that permits be obtained from the Board of Commerce and Navigation (later made part of the Department of Environmental Protection) to build structures on riparian lands or to legalize structures already in place. *Id.* New Jersey's approach to regulating the State's riparian lands has remained essentially unchanged since 1914, except that in 1978 the Tidelands Resource Council determined that its conveyances would be conditioned upon an applicant's obtaining all required State, federal, and local regulatory permits. (*See* Castagna Aff. ¶ 7, App. 29a.)

From its earliest days, the State of New Jersey has applied its regulatory system to lands on the New Jersey side of the Delaware River within the Twelve-Mile Circle. Indeed, on at least eight occasions from 1854 to 1905, the New Jersey Legislature and then the Board of Riparian Commissioners approved various riparian grants extending below the mean low-water line in the Twelve-Mile Circle area. (*See* Castagna Aff. ¶ 8, App. 29a, 31a-36a, 54a.) And from 1905 to the present, New Jersey has exercised its riparian jurisdiction in this area on at least thirty-three occasions by approving State tidelands conveyances within the Twelve-Mile Circle. (*Id.*, App. 29a, 36a-51a, 54a.)<sup>4</sup>

In recent decades, the Legislature has further expanded New Jersey's regulation of riparian lands, including those within the Twelve-Mile Circle, by imposing additional regulatory and permitting requirements. (*See* Reading Aff. ¶¶ 3-5, App. 56a-57a; Sickels Aff. ¶¶ 2-6, App.

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<sup>4</sup> A map showing the approximate location of New Jersey's riparian grants within the Twelve-Mile Circle is found at App. 54a.

62a-63a; Broderick Aff. ¶¶ 4-5, App. 67a-68a.)<sup>5</sup> New Jersey has applied these expanded requirements to dredging, pier construction, discharge pipes and water diversion structures located outshore of the low-water line within the Twelve-Mile Circle. (See Reading Aff. ¶¶ 9-13, App. 58a-60a; Sickels Aff. ¶¶ 7-9, App. 63a-64a; Broderick Aff. ¶¶ 11-16, App. 70a-72a.)

**C. *New Jersey v. Delaware II.***

Although the 1905 Compact resolved many issues, the boundary line remained undetermined. In 1925 and 1926, a dispute over the ownership of an oyster bed in the Delaware Bay south of the Twelve-Mile Circle rekindled the controversy. (Record, No. 11, Orig., Pl. Ex. 107, 108.) The parties were again unable to resolve the dispute (which had been left open by Article VI of the Compact of 1905), (*id.*, Pl. Ex. 5), and this Court granted New Jersey leave to file suit to determine the line along the entire boundary, both within and below the Twelve-Mile Circle (“*New Jersey v. Delaware II*”). See 279 U.S. 825 (1929). The Court appointed a Special Master, who submitted his report on October 9, 1933. 55 S.Ct. 934 (1933). Both States filed exceptions.

On February 5, 1934, the Court confirmed the Special Master’s report. 291 U.S. at 385. Within the Twelve-Mile Circle, the Court set the boundary line at the mean low-water line on the New Jersey shore, “subject to the Compact of 1905.” *Id.* South of the Twelve-Mile Circle, the Court set the line at the middle of the main shipping channel.

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<sup>5</sup> “Reading Aff.,” “Sickels Aff.,” and “Broderick Aff.” refer to the Affidavits of Jeffrey T. Reading, Frederick Sickels, and Kevin Broderick in Support of Motion To Reopen And For A Supplemental Decree, found respectively at App. 55a, 61a, and 66a.

*Id.* The Decree provided: “The State of Delaware, its officers, agents and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree . . . .” 295 U.S. at 698. The Decree was “without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . .” *Id.* at 699.

#### **D. The Present Controversy.**

##### **1. Delaware’s Recent Regulation of Structures on New Jersey’s Shore.**

In 1957 and 1958, the Delaware State Highway Department acknowledged that, under Article VII of the Compact of 1905, Delaware lacked riparian jurisdiction over the construction of improvements appurtenant to the New Jersey side of the River within the Twelve-Mile Circle. (*See* Donlon Aff. ¶¶ 7-8 & Ex. C-G, App. 87a-89a, 102a-110a.)<sup>6</sup> Delaware at that time conceded that such improvements were subject solely to New Jersey’s authority. (*Id.*) In more recent years, however, Delaware has asserted jurisdiction over such projects on the New Jersey side.

In 1971, Delaware adopted the Delaware Coastal Zone Act, 58 Del. Laws ch. 175 (1971), codified at Del. Code Ann. tit. 7, §§ 7001-7013 (2005) (the “DCZA”). The DCZA declares that it is Delaware’s policy “to prohibit entirely the construction of new heavy industry in its coastal

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<sup>6</sup> “Donlon Aff.” refers to the Affidavit of Amy C. Donlon, Deputy Attorney General, State of New Jersey, in Support of Motion To Reopen And For A Supplemental Decree, found at App. 84a.

areas, which industry is determined to be incompatible with the protection of that natural environment in those areas.” *Id.* § 7001. The DCZA prohibits “bulk product transfer facilities” in the coastal zone, except for those in the Port of Wilmington. *Id.* §§ 7002(f), 7003. Industrial development other than that of heavy industry requires a permit issued by the Secretary of the Delaware Department of Natural Resources and Environmental Control (“DNREC”). *Id.* § 7004. Persons who violate the DCZA are subject to a fine of up to \$50,000 per day for each day of the violation. *Id.* § 7011.

In 1986, Delaware enacted the Subaqueous Lands Act, 65 Del. Laws ch. 508 (1986), codified at Del. Code Ann. tit. 7, §§ 7201-7217 (2005) (the “DSLAs”). The DSLAs provide that “[n]o person shall deposit material upon or remove or extract materials from, or construct, modify, repair or reconstruct, or occupy any structure or facility upon submerged lands or tidelands without first having obtained a permit, lease or letter of approval from the Department.” *Id.* § 7205(a). The DSLAs also provide “[t]here shall be no appeal of a decision by the Secretary to deny a permit on any matter involving state-owned subaqueous lands.” *Id.* § 7210. Violations of the DSLAs are punishable by civil fines and criminal penalties. *Id.* § 7214.

Delaware has applied these laws to a limited number of projects on the New Jersey side of the River, and just this year actually invoked these laws to block a project on New Jersey’s side.

On December 13, 1991, DNREC issued a DCZA permit to Keystone Cogeneration Systems, Inc., now known as Logan Generating Company, L.P. (“Logan”), to construct a pier and water intake structure in the Delaware River to service a 225-MW coal fired power plant in New Jersey.

(*See* Donlon Aff. ¶ 26, App. 96a.) To New Jersey’s knowledge, since 1991, the only other applicant for a DCZA permit for the construction of an improvement appurtenant to the New Jersey shore has been Crown Landing LLC, an affiliate of BP America, Inc., whose DCZA application was denied just this year.

In the case of Crown Landing, Delaware withheld a DCZA permit in March 2005, effectively blocking the project. (Segal Dec. ¶¶ 9-22, App. 137a-142a.)<sup>7</sup> Crown Landing is seeking to construct and operate a liquefied natural gas (“LNG”) import terminal and re-gasification facility in Logan Township, New Jersey. (*Id.* ¶ 2, App. 133a-134a.) The LNG facility will be located entirely within New Jersey, but the project depends on an unloading pier extending into the Delaware River approximately 2,000 feet beyond the low-water mark. (*Id.* ¶ 4, App. 134a-135a.) The facility is supported by the New Jersey Board of Public Utilities as a means to increase the “vital” supply of natural gas to New Jersey. (*Id.* ¶ 8 & Ex. 4, App. 137a, 150a-151a; Fox Aff. ¶ 15, App. 82a.)<sup>8</sup>

Crown Landing initially applied for a DSLA permit for the pier in September 2004, but Delaware declined to issue the DSLA permit until Crown Landing first obtained a DCZA permit. (Segal Dec. ¶¶ 10-11, App. 138a.) Accordingly, on December 7, 2004, Crown Landing submitted to the Secretary of DNREC a request for a status decision that the Crown Landing pier was permitted by the DCZA. (*Id.* ¶ 14, App. 139a.) On February 3, 2005, the

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<sup>7</sup> “Segal Dec.” refers to the Declaration of Lauren B. Segal, found at App. 133a.

<sup>8</sup> “Fox Aff.” refers to the Affidavit of Jeanne M. Fox in Support of Motion To Reopen And For A Supplemental Decree, found at App. 78a.

Secretary determined that the LNG facility was an “offshore bulk transfer facility” as well as a “heavy industry use” specifically prohibited by the DCZA. (*Id.* ¶ 15 & Ex. 2, App. 139a, 146a-147a.) He also concluded that the “on-shore storage tanks essential to the operation of the facility,” although located in New Jersey, “are prohibited structures.” (App. 147a.) The Secretary explained that, “[d]espite the benefits that increased LNG imports might bring, placement of this facility within the boundaries of Delaware is, in my opinion, clearly a prohibited use within Delaware’s coastal zone.” (*Id.* ¶ 16 & Ex. 2, App. 139a-140a, 147a.) On March 30, 2005, the Delaware Coastal Zone Industrial Control Board affirmed the Secretary’s decision. (*Id.* ¶ 17, App. 140a.) The decision has now become final. (*Id.* ¶ 19, App. 140a-141a.)

Similar to Delaware’s permitting actions under the DCZA, only a few applicants have requested DSLA approvals for improvements on the New Jersey side of the River. (*See* Donlon Aff. ¶ 6, App. 86a.) DNREC issued a DSLA permit to Logan on September 30, 1991 for the pier and water intake for which Logan obtained a DCZA permit. (*Id.* ¶ 18, App. 93a.) In 1996, as part of a joint project to reestablish historical ferry service between the two States, the New Jersey Division of Parks and Forestry obtained a DNREC subaqueous lands lease for construction of a pier adjacent to Ft. Mott State Park in Salem County, New Jersey. (*Id.* ¶ 20, App. 93a-94a.)

Just this year, DNREC approved a DSLA permit for Fenwick Commons, LLC, for the renovation of a marina and piers appurtenant to “The Riverwalk at Penns Grove,” a redevelopment project in the Borough of Penns Grove, New Jersey, (*id.* ¶¶ 21-22 & Ex. M, App. 94a-95a, 131a-132a), and also issued Fenwick Commons a determination, pursuant to § 307 of the federal Coastal Zone Management Act, 16

U.S.C. § 1456 (the “FCZMA”), that its project was consistent with Delaware’s coastal zone management plan (Donlon Aff. ¶ 21, App. 94a).<sup>9</sup> New Jersey has asserted jurisdiction over this specific structure for the last 150 years – by legislative action in 1855, by executive actions in 1916 and 1921, and by judicial actions in 1958 and in 1962. (Castagna Aff. ¶ 8(1), (12), (19), App. 31a, 36a-37a, 40a.)

Fenwick Commons notified Delaware on May 6, 2005, that “[f]inancing considerations” compelled it to obtain the Delaware permit in order to proceed with the project. (Donlon Aff. ¶ 22 & Ex. M, App. 94a-95a, 131a-132a.) But Fenwick Commons nonetheless stated: “the issue as to ownership of lands is in dispute as to the Riparian Grants from the State of New Jersey . . . . Our position is that we will leave the issue of riparian rights and Delaware ownership to be resolved at a different time and in a different for[u]m.” (*Id.*)

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<sup>9</sup> The FCZMA was enacted in 1972 to encourage coordination and cooperation between federal, state, and local coastal zone management activities, *see* 16 U.S.C. § 1452(4),(5), but does not modify or supersede any interstate compact. 16 U.S.C. § 1456(e)(1). After the enactment of the FCZMA, New Jersey prepared its own coastal zone management plan in which it recognized potential conflicts that could arise with Delaware over regulation of projects within the Twelve-Mile Circle and the need for coordination between the States for such projects. (*See* Affidavit of Steven Whitney in Support of Motion To Reopen And For A Supplemental Decree (“Whitney Aff.”) ¶¶ 2, 3, App. 73a-75a.) For a period of time, New Jersey and Delaware sought a means for resolving these potential conflicts between each State’s coastal zone management policies through a formal agreement. (*See id.* ¶¶ 6, 7, App. 75a-76a.) However, New Jersey subsequently abandoned those efforts because of concerns that such an agreement would create an overly cumbersome approval process and would give Delaware effective veto power over projects on the New Jersey side of the Delaware River that met New Jersey standards. (*See id.* ¶ 8, App. 76a.)

## **2. New Jersey's Efforts to Resolve the Controversy.**

Delaware's actions have precipitated a serious controversy between the States. New Jersey state officials have sought, without success, to persuade Delaware that its assertion of jurisdiction over improvements appurtenant to the New Jersey shoreline violates Article VII of the Compact of 1905. On April 11, 2005, following informal efforts to reach a settlement, Paul T. Fader, Chief Counsel to the Acting Governor of New Jersey, Richard J. Codey, formally advised his Delaware counterpart, Joseph C. Schoell, Legal Counsel to Delaware Governor Ruth Ann Minner, that, under the Compact of 1905, "Delaware does not have jurisdiction over the construction of this project or any project appurtenant to New Jersey's shoreline." (App. 17a-18a.) New Jersey cited the plain language of Article VII, this Court's holding in 1934 that the boundary determination was "subject to the Compact of 1905," and this Court's recent opinion in *Virginia v. Maryland*, 540 U.S. 56 (2003), deciding a similar issue under the 1785 Compact between Virginia and Maryland. (App. 17a-20a.) Delaware responded on May 9, 2005, arguing that the Compact of 1905 limited New Jersey's riparian jurisdiction solely to New Jersey's territory above the low-water mark on the New Jersey shore. (App. 21a-24a.)

The New Jersey Legislature has likewise protested Delaware's exercise of permitting authority over structures appurtenant to the New Jersey shoreline. On May 16, 2005, the New Jersey State Assembly unanimously adopted a resolution urging the Governor and General Assembly of Delaware to amend the DCZA to make clear that it "does not apply to facilities over which New Jersey retains riparian jurisdiction pursuant to Article VII of the Compact." (App.



155a-158a.) A nearly identical resolution is pending in the New Jersey Senate. (App. 159a-164a.)

Concerned that Delaware’s continued assertion of regulatory authority “effectively restricts industrial development and significantly chills other development on the New Jersey shoreline within the twelve-mile circle of New Castle, Delaware,” thirty-one New Jersey legislators recently introduced a bill requiring that New Jersey state pension funds be withdrawn from Delaware banks unless Delaware conforms its permitting laws to respect New Jersey’s rights under the 1905 Compact. (App. 261a-265a.) Two Delaware legislators subsequently introduced legislation authorizing the Governor to call on the National Guard of Delaware to remove any “encroachments” upon Delaware’s boundary. (App. 266a-268a.)<sup>10</sup>

## LEGAL ARGUMENT

### I.

#### **THE COURT SHOULD EXERCISE ITS CONTINUING ORIGINAL JURISDICTION TO ENFORCE THE 1905 COMPACT.**

Article III, Section 2, Clause 2 of the Constitution of the United States grants original jurisdiction to the Supreme Court “[i]n all Cases . . . in which a State shall be Party . . . .” Congress has additionally provided that this Court “shall have original and exclusive jurisdiction of all controversies

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<sup>10</sup> Conceivably, this bill would authorize Delaware’s National Guard to remove any structure outshore of New Jersey’s low-water mark, including any historic pier that long ago received approval from New Jersey but which Delaware has not previously attempted to regulate.

between two or more States.” 28 U.S.C. § 1251(a). An exercise of this Court’s original jurisdiction is necessary here in order to enforce New Jersey’s rights under Article VII of the 1905 Compact, which were specifically preserved by this Court in the 1935 Decree.

As noted above, although the Court in 1934 established the boundary within the Twelve-Mile Circle at the low-water mark on the New Jersey side, that ruling was “subject to the Compact of 1905.” *New Jersey v. Delaware II*, 291 U.S. at 385. The Decree issued by the Court in 1935 provided: “The State of Delaware, its officers, agents and representatives, its citizens and all other persons, are perpetually enjoined from disputing the sovereignty, jurisdiction and dominion of the State of New Jersey over the territory adjudged to the State of New Jersey by this decree . . . .” 295 U.S. at 698. The Decree also provided that it was “without prejudice to the rights of either state, or the rights of those claiming under either of said states, by virtue of the compact of 1905 between said states . . . .” *Id.* at 699. The Court “retain(ed) jurisdiction of this cause for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may at any time deem to be proper in order to carry into effect any of the provisions of this decree . . . .” *Id.* at 698.

Since Delaware has now made it clear that it will not respect New Jersey’s exercise of riparian jurisdiction over structures appurtenant to the New Jersey side of the River within the Twelve-Mile Circle, it is appropriate to reopen *New Jersey v. Delaware II* to confirm that the 1935 Decree protects New Jersey’s rights under the Compact.

In *Mississippi v. Louisiana*, 506 U.S. 73 (1992), the Court identified two factors to be considered in determining whether to exercise its original jurisdiction. *Id.* at 77. First,

the Court must consider the interests of the complaining state, focusing on the “seriousness and dignity” of the claim. *Id.* (internal quotation marks omitted). Second, the Court must consider whether there is an alternative forum in which the issues tendered can be fully resolved. *Id.* It is not clear to what extent this traditional two-factor test for exercising original jurisdiction applies when, as in this case, the Court has retained continuing jurisdiction pursuant to an earlier decree.<sup>11</sup> Nevertheless, even if that two-factor test is applicable here, this controversy warrants the Court’s exercise of original jurisdiction.

First, the matters in controversy are grave and important. This case will decide whether New Jersey can exercise its sovereign right to regulate the riparian rights of its own citizens along its own shoreline within the Twelve-Mile Circle, free of regulation by Delaware, and whether Delaware can interfere with New Jersey’s control of growth and development in this area. The answer depends on this Court’s interpretation of the 1905 Compact that settled the States’ litigation in *New Jersey v. Delaware I*, and that was specifically preserved in this Court’s opinion and decree in *New Jersey v. Delaware II*. The “seriousness and dignity” requirement is clearly met here. Indeed, the Court recently asserted original jurisdiction over a very similar dispute between Virginia and Maryland, concluding that Virginia alone had the right to regulate the riparian rights of its own citizens in the Potomac River under the Compact of 1785, notwithstanding that waterfront projects in Virginia extended

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<sup>11</sup> The Court included a similar continuing jurisdiction provision in its decree in *Nebraska v. Wyoming*, 325 U.S. 589, 671-72 (1945) (No. 6, Orig.). Over forty years later, Nebraska filed a Motion for Leave to File a Petition for an Order Enforcing Decree and for Injunctive Relief. The Court granted Nebraska’s motion and docketed the case as No. 108, Original. 479 U.S. 1051 (1987).

across the boundary line into Maryland. *Virginia v. Maryland*, 540 U.S. at 71-72.<sup>12</sup>

Second, no alternative forum exists where the Compact question can be resolved. So far in 2005, Delaware has twice asserted jurisdiction over two major developments within New Jersey's riparian jurisdiction – Crown Landing's LNG project and Fenwick Commons' Riverwalk. Delaware barred construction of the Crown Landing facility, and that action has become final. (Segal Dec. ¶ 19, App. 140a-141a.) By contrast, Delaware approved the Riverwalk project even though Fenwick Commons reserved its objection to Delaware's assertion of authority. (Donlon Aff. ¶¶ 21-22 & Ex. M, App. 94a-95a, 131a-132a.) Neither landowner is currently litigating Delaware's claimed authority. Accordingly, just as in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), “no pending action exists to which [this Court] could defer adjudication on this issue.” *Id.* at 452.

Even if Delaware provided a venue in which private entities could challenge Delaware's assertion of riparian jurisdiction, New Jersey's sovereign interests would not be directly represented. More importantly, a Delaware venue clearly would not provide New Jersey an adequate forum in which to seek redress for Delaware's challenge to its sovereignty. As this Court has recognized, “[i]t requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States . . . can be unilaterally

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<sup>12</sup> The Court's decision to resolve this controversy will defuse the increasing tensions between the States illustrated by recent bills introduced in both States' legislatures. *See supra* at 16-17. This escalating dispute presents the “model case” for the Court's original jurisdiction, without which the controversy “would amount to *casus belli* if the States were fully sovereign.” *Mississippi v. Louisiana*, 506 U.S. at 77 (internal quotation marks omitted); *see also Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991).

nullified, or given final meaning by an organ of one of the contracting States.” *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). The ability to invoke the jurisdiction of the Supreme Court to enforce an interstate compact represents an important element of a State’s willingness to enter such agreements, since it is difficult to conceive why a state would enter a compact if it had to seek redress for violations in the courts of the other state. *See Texas v. New Mexico*, 462 U.S. 554, 569 (1983).

In addition to the two factors identified by the Court in *Mississippi v. Louisiana*, the Court has generally limited its exercise of original jurisdiction to matters which constitute a justiciable case or controversy within the meaning of the Constitution. *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939). This requires a determination that a state has suffered an apparent wrong by another state’s actions which furnishes grounds for judicial redress, or that it asserts a judicially enforceable right under accepted principles of common law or equity. *Id.* To the extent that this requirement applies when the Court has retained jurisdiction of a prior dispute, New Jersey is asserting an injury to an enforceable right based on Delaware’s assertion of jurisdiction over riparian development on the New Jersey shore, in violation of the 1905 Compact. *See Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991) (a compact not only has the force of federal law, but constitutes a contract between the participating states).

Moreover, Delaware’s assertion of jurisdiction clearly presents a justiciable case or controversy. Delaware’s rejection of the Crown Landing project and its actions regarding the Riverwalk project are a direct affront to New Jersey’s right to act in the interests of its citizens to regulate growth and development along its own shoreline. Delaware’s interference could discourage development

applications in this area of New Jersey's shoreline by requiring approval from two separate States. (Castagna Aff. ¶ 12, App. 52a.) Further, reduced riparian development could in the long term reduce the income realized by the New Jersey School Fund, the beneficiary of money received from riparian grants. (*Id.* ¶ 13, App. 52a.) Delaware's actions also affect the property rights held by the State of New Jersey itself, since New Jersey could be required to seek regulatory approvals from Delaware to develop public lands that it owns within the Twelve-Mile Circle. (*Id.* ¶ 11, App. 52a.) Arguably, Delaware's assertion of jurisdiction could subject New Jersey employees to criminal penalties for taking soil samples on the New Jersey side of the Delaware River if this were done without obtaining a permit from Delaware. *See* Del. Code Ann. tit. 7, §§ 7205, 7214 (2005). (*See also* Segal Dec. ¶ 10, App. 138a.)

In short, Delaware's assertion of riparian jurisdiction in violation of the 1905 Compact presents a clear case or controversy requiring resolution by the only tribunal authorized to interpret the Compact in a manner binding on both States. New Jersey has properly invoked this Court's original jurisdiction.

## II.

### **THE COURT SHOULD ENJOIN DELAWARE FROM FURTHER VIOLATIONS OF THE 1905 COMPACT.**

Delaware has made clear that it will not respect New Jersey's exercise of exclusive riparian jurisdiction over improvements appurtenant to the New Jersey shoreline within the Twelve-Mile Circle, as reserved by the Compact. Accordingly, this Court should reopen *New Jersey v. Delaware II* and issue a supplemental decree to confirm New

Jersey's rights under the 1905 Compact and to enjoin Delaware from further interfering with those rights.

A compact is “a contract . . . . It remains a legal document that must be construed and applied in accordance with its terms.” *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal quotations and citations omitted). In addition, “congressional consent ‘transforms an interstate compact . . . into a law of the United States’ . . . .” *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)). “Once a compact between States has been approved [by Congress], ‘it settles the line or original right; it is the law of the case binding on the states and its citizens, as fully as if it had never been contested.’” *New Jersey v. New York*, 523 U.S. at 810 (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 727 (1838)). “Just as if a court were addressing a federal statute, then, the ‘first and last order of business’ of a court addressing an approved interstate compact ‘is interpreting the compact.’” *New Jersey v. New York*, 523 U.S. at 811 (quoting *Texas v. New Mexico*, 462 U.S. at 567-68); *Virginia v. Maryland*, 540 U.S. at 66.

“Accordingly, where the terms of the compact are unambiguous, this Court must give effect to the express mandate of the signatory States.” *Oklahoma v. New Mexico*, 501 U.S. at 245 (Rehnquist, C.J., concurring in part and dissenting in part). In this case, interpretation of the 1905 Compact presents a clear issue of law that should be decided in favor of New Jersey.

**A. The Plain and Unambiguous Language of the Compact of 1905 Confirms that New Jersey Retained Riparian Jurisdiction Over Structures Extending Below the Low-Water Mark on the New Jersey Shore, Free From Regulation by Delaware.**

Article VII of the 1905 Compact provides:

Each State may, on its own side of the river, continue to exercise riparian jurisdiction of every kind and nature, and to make grants, leases, and conveyances of riparian lands and rights under the laws of the respective States. Act of Jan. 24, 1907, ch. 394, 34 Stat. 858 (1907). (App. 5a.)

The use of the phrase “riparian jurisdiction” connotes State sovereignty over riparian improvements. “Riparian” derives from the Latin word “ripa,” meaning “shore of the river,” and is defined as “[o]f or pertaining to the bank of a river; as, riparian rights.” Webster’s Unabridged Dictionary 1244 (1898). And “jurisdiction,” as used in Article VII, refers to the “authority of a sovereign power to govern or legislate.” *Id.* at 806. Thus, the term “riparian jurisdiction” clearly refers to each State’s sovereign authority to regulate activities on its own shores of the Delaware River.

At the time of the 1905 Compact, “riparian jurisdiction” also was clearly understood in both States to encompass the regulation of improvements extending outshore of the low-water mark. It has long been recognized that a primary objective of riparian improvements is the ability to wharf out from the shore, beyond the low-water mark, as necessary to gain access to navigable waters.



*See Mayor of Newark v. Sayre*, 45 A. 985, 990 (N.J. 1900). Delaware has similarly recognized that “[a]mong the riparian property rights associated with ownership of the foreshore is the right to wharf out directly from the foreshore to the bulkhead line and the right to have free access to the navigable portion of a river.” *City of Wilmington v. Parcel of Land*, 607 A.2d 1163, 1168 (Del. 1992) (citing *Harlan & Hollingsworth Co. v. Paschall*, 5 Del. Ch. 435, 456-57 (Del. Ch. 1882)). And, as this Court recognized in *New Jersey v. Delaware II*, “riparian proprietors have very commonly enjoyed the privilege of gaining access to a stream by building wharves and piers . . . .” 291 U.S. at 375.

Article VII of the 1905 Compact makes clear that such jurisdiction is to be interpreted broadly. It is jurisdiction “of every kind and nature.” Moreover, Article VII specifically confirmed that each State would be able to exercise its riparian jurisdiction exclusive of the other’s. Each State would be able to exercise its authority “on its own side of the river” pursuant to “the laws of the respective States.” This means that each State’s exercise of its riparian jurisdiction would not be interfered with by the other State.

The use of the term “continue” is also of critical importance because it shows that the States intended that their riparian sovereignty could carry on in the same manner as had been exercised in the past. Before the Compact was enacted, New Jersey had exercised riparian jurisdiction over the construction of docks, wharves, piers, and other waterfront developments, pursuant to statutes that applied to all of the State’s waterfront, including within the Twelve-Mile Circle. *See, e.g.*, 1851 N.J. Laws 335; N.J. Stat. Ann. § 12:3-10, -12, -21.<sup>13</sup> Further, it was well established before

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<sup>13</sup> This included dredging to reach the navigable channel. *See* N.J. Stat. Ann. § 12:3-21 (1979) (enacted in 1891).

the 1905 Compact that the right to build riparian improvements was subject to state regulation. *E.g.*, *Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 64-65 (1873) (riparian proprietor may construct wharves or piers “subject to such general rules and regulations as the legislature may prescribe for the protection of the public”).

On at least eight occasions prior to 1905, New Jersey had issued grants for riparian lands and structures extending well below the low-water mark on the New Jersey side within the Twelve-Mile Circle. (*See* *Castagna Aff.* ¶ 8, App. 29a, 31a-36a, 54a.) As part of this grant process, New Jersey imposed appropriate regulatory conditions on those conveyances, such as prohibiting “the extension of such docks or wharves so far into said river as to injure or impede the navigation of the same.” *E.g.*, 1854 N.J. Laws ch. 143, § 1; 1855 N.J. Laws ch. 109, § 4 (same); 1871 N.J. Laws ch. 307, § 1 (“provided, however, that no such wharf, pier or bulkhead shall be erected or built . . . for a greater distance than one hundred feet beyond low water mark, nor in front of the land of any other person”). Thus, when the Compact of 1905 provided that the States would “continue” to exercise “riparian jurisdiction of every kind and nature” under the “laws of the respective states,” it confirmed that New Jersey would continue to exercise riparian jurisdiction in the same manner to which it had been historically accustomed: free of regulation or interference by Delaware.

Other provisions of the Compact reinforce this conclusion. Articles I and II limit the States from asserting jurisdiction over wharves or docks attached to the other State by prohibiting the service of process by one State aboard a vessel attached to a pier or wharf on the banks of the other. This language recognizes a unique status for such riparian structures under the Compact and underscores the intent of the drafters to ensure that wharves and piers were subject

solely to the jurisdiction of the State to whose riverbank they were attached. Similarly, Article IV called for the enactment of concurrent fishing laws, and Article V provided for each State's fishing laws to continue in effect until such concurrent laws were passed. Just as in *Virginia v. Maryland*, "the drafters carefully delineated the instances in which the citizens of one State would be subject to the regulatory authority of the other." 540 U.S. at 67. If the drafters of Article VII had intended for Delaware to have either exclusive or concurrent authority to regulate New Jersey's riparian improvements, they would have said so.

**B. Delaware's Previous Admissions and the Parties' Construction of the Compact Demonstrate New Jersey's Right to Regulate Riparian Users On Its Own Side of the River, Free From Regulation by Delaware.**

The actions by both New Jersey and Delaware since the 1905 Compact confirm that New Jersey retained exclusive riparian jurisdiction on its own side of the Delaware River, free from regulation by Delaware.

**1. Delaware's Concessions in *New Jersey v. Delaware II* Confirm that New Jersey Has Exclusive State Riparian Jurisdiction.**

The 1905 Compact was at issue in *New Jersey v. Delaware II*. New Jersey argued that the long history of riparian improvements by New Jersey citizens established New Jersey's ownership in parts of the Delaware riverbed outshore of the mean low-water line within the Twelve-Mile Circle, and that the 1905 Compact confirmed this ownership. (App. 171a-175a.) While disputing New Jersey's claims of ownership, Delaware conceded both the right of New Jersey citizens to wharf out to navigable water and the exclusive

right of New Jersey to regulate the exercise of those riparian rights.

In its Reply Brief to the Special Master, Delaware clearly conceded that New Jersey enjoyed exclusive regulatory jurisdiction over its riparian lands, stating: “Article VII of the Compact is obviously merely a recognition of the rights of the riparian owners of New Jersey and a cession to the State of New Jersey by the State of Delaware of jurisdiction to regulate those rights.” (App. 186a (emphasis added).) Delaware further conceded New Jersey’s exclusive regulatory authority over such rights in its oral argument before the Special Master:

We say moreover that the Compact of 1905 expressly acknowledged the rights of the citizens of New Jersey, at least, by implication to wharf out, and in my view the Compact of 1905 *ceded* to the State of New Jersey all the right to control the erection of those wharves and to say who shall erect them, and it was a very sensible thing to do. (App. 191a (emphasis added).)

The Special Master accepted Delaware’s concessions. He concluded that Delaware’s “dominion and jurisdiction” in the River was “*modified* by the compact of 1905 between the States of Delaware and New Jersey.” (App. 255a (emphasis added).) “Under this Compact clearly all improvements made by riparian owners upon the shore of either State are protected, and any decree fixing the boundary . . . must so provide.” (App. 249a.)

On numerous other occasions before this Court, Delaware conceded that the 1905 Compact protected riparian

rights on the New Jersey side of the Delaware River. (*E.g.*, App. 215a (“[T]he State of Delaware has never questioned the right of citizens of New Jersey to wharf out to navigable water nor can such a right be questioned because it is clearly protected by the Compact of 1905 between the States.”); App. 235a (“The effect of Article VII of the Compact . . . was that the State of Delaware recognized the rights of the inhabitants on the east side of the river to wharf out to navigable water. This right had never been questioned and was undoubtedly inserted to put beyond question the *riparian rights* (as distinguished from *title*) of land owners in New Jersey.”) (emphasis in original).)

Indeed, Delaware *reassured* the Court that setting the boundary on the New Jersey side within the Twelve-Mile Circle would not interfere with New Jersey’s riparian improvements because the 1905 Compact prevented such interference:

Much is said by the Plaintiff . . . of the great value of these wharf rights on the New Jersey side. The implication in the brief is that if the boundary line between the States is determined to be low-water mark on the New Jersey shore the interests of the riparian owners will be either destroyed or seriously prejudiced. *This, of course, is simply not the fact. The Compact of 1905 above referred to recognized the rights of riparian owners in the river to wharf out, and the Master so found.* (App. 223a (emphasis added).)

And when New Jersey argued (albeit unsuccessfully) that the 1905 Compact already had set the boundary in the middle of the river by giving New Jersey the right to grant riparian

lands below the low-water mark, Delaware responded as follows:

Even if the Compact of 1905 be construed as ceding to the State of New Jersey *the right to determine* to whom riparian rights (i.e., wharf rights appurtenant to riparian lands) shall be granted, it would still not affect the boundary between the States in any conceivable way. (App. 237a (emphasis in original).)

In short, Delaware conceded that the 1905 Compact both protected the right of New Jersey citizens to wharf out to navigable water and ceded to New Jersey the jurisdiction to regulate the exercise of such rights.

**2. The Plain and Unambiguous Language of the 1905 Compact is Reinforced by the States' Construction of the Compact.**

The contemporaneous construction by New Jersey and Delaware of each State's riparian jurisdiction under the 1905 Compact confirms that New Jersey retained exclusive riparian jurisdiction on its side of the Delaware River.

Following the enactment of the 1905 Compact, New Jersey continued to exercise its riparian jurisdiction over activities on the New Jersey side of the Delaware River within the Twelve-Mile Circle. Since 1905, New Jersey has issued at least thirty-three riparian grants extending below low-water within the Twelve-Mile Circle. (Castagna Aff. ¶ 8, App. 29a, 36a-51a, 54a.) In addition, New Jersey has exercised its riparian jurisdiction by applying regulatory and permitting requirements to various improvements and activities offshore of the low-water line in the Twelve-Mile

Circle, including dredging, pier construction, stormwater and wastewater discharge pipes, and water diversion. (See Reading Aff. ¶¶ 9-13, App. 58a-60a; Sickels Aff. ¶¶ 7-9, App. 63a-64a; Broderick Aff. ¶¶ 11-16, App. 70a-72a.)

In addition, New Jersey's courts, beginning nearly 50 years ago, affirmed New Jersey's right under the 1905 Compact to regulate activities occurring on riparian structures and to tax the value of such improvements, notwithstanding the 1934 boundary decision. See *New Jersey v. Federanko*, 139 A.2d 30, 36-37 (N.J. 1958) (affirming conviction for gambling that occurred on the Pennsgrove Pier);<sup>14</sup> *Main Assocs. Inc. v. B&R Enters., Inc.*, 181 A.2d 541, 543-45 (N.J. Super. Ct. Ch. Div. 1962) (upholding authority of Borough of Penns Grove to tax the value of the pier).

Thus, New Jersey's "contemporaneous reading" of the 1905 Compact and conduct following its enactment confirm that Article VII protected New Jersey's right to regulate riparian uses on its side of the River within the Twelve-Mile Circle, free from regulation by Delaware. See *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 466 (1986) ("The agencies' contemporaneous reading of the statute lends strong support to our interpretation.").

Over the same period, Delaware's construction of the 1905 Compact "has been neither contemporaneous with its enactment nor consistent since the statute came into law." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). In 1957, Delaware ceased an attempt to assert authority over a

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<sup>14</sup> In *Federanko*, Delaware submitted a brief adopting New Jersey's position that the 1905 Compact remained in effect after this Court's decision in *New Jersey v. Delaware II*. 139 A.2d at 33.

private outflow pipe on the New Jersey side of the River when the private landowner – E.I. DuPont de Numours & Co. (“DuPont”) – protested that Delaware lacked jurisdiction under the 1905 Compact. (*See* Donlon Aff. ¶¶ 7-8 & Ex. C-G, App. 87a-89a, 102a-110a.) Indeed, the Delaware State Highway Department’s legal counsel advised that Delaware had no jurisdiction over improvements appurtenant to the New Jersey side of the River within the Twelve-Mile Circle:

I concur in [DuPont’s] opinion that, pursuant to the terms of the Treaty of 1905 and the United States Supreme Court decision of 1933 [sic], the State of New Jersey is the proper authority with which the DuPont Company should deal in connection with any lands lying under the Delaware River within the boundary of the State of Delaware, but on the New Jersey side of the river and within the twelve-mile circle. (*Id.* ¶ 8(b) & Ex. E, App. 88a, 107a.)

Acting on that advice, the Delaware State Highway Department adopted a resolution on December 11, 1957, affirming that the Department “has no jurisdiction” over projects on the New Jersey side of the River within the Twelve-Mile Circle. (*Id.* ¶ 8(c) & Ex. G, App. 88a-89a, 109a-110a.) Delaware notified the United States Army Corps of Engineers accordingly by letter dated December 13, 1957. (*Id.* ¶ 8(d) & Ex. F, App. 89a, 108a.)

DuPont renewed its protests of Delaware’s riparian jurisdiction in 1971, when Delaware sought to charge lease fees to DuPont for the construction of a bulkhead, pier, and fuel oil storage tank appurtenant to the New Jersey shoreline on riparian land previously granted to DuPont by the State of



New Jersey. (*Id.* ¶¶ 9-11 & Ex. H-J, App. 89a-91a, 111a-125a.) In the face of DuPont’s invocation of the Compact, Delaware agreed to defer requiring any lease payments until such time as a federal court of competent jurisdiction resolved whether DuPont held superior title to Delaware. (*Id.* ¶ 11 & Ex. J, App. 91a, 121a.) The issue arose again in 1981, at which time DuPont again protested Delaware’s jurisdiction based on the 1905 Compact and declined to make lease payments. (*Id.* ¶ 13 & Ex. L, App. 91a-92a, 128a-130a.) Although New Jersey has not been a party to that continuing controversy, it appears that the lease dispute remains unresolved.

Notwithstanding Delaware’s enactment of the DCZA in 1971 and the DSLA in 1986, Delaware has issued permits to only a limited number of users on the New Jersey side, and it did not actually block a project until 2005. *See supra* at 11-15. Thus, the States’ construction of the 1905 Compact reinforces the conclusion that the Compact protects New Jersey’s right to regulate riparian uses on its side of the River within the Twelve-Mile Circle, free from regulation by Delaware.

### III.

#### IT IS UNNECESSARY TO APPOINT A SPECIAL MASTER.

The Court should decide this case without appointing a special master. This controversy requires simply a legal ruling on the proper construction of the Compact of 1905. This ruling need only recognize that Article VII of the Compact unambiguously gives New Jersey exclusive authority over riparian improvements on its side of the River, as Delaware conceded here in the 1930s. Further, this Court

recently decided a similar legal issue in *Virginia v. Maryland*, 540 U.S. 56, so the legal guideposts are clear. Accordingly, the Court can and should decide this case without appointing a special master. *See, e.g., California ex rel. State Lands Comm'r v. United States*, 457 U.S. 273, 278 (1982) (No. 89, Orig.) (“No essential facts being in dispute, a special master was not appointed and the case was briefed and argued.”); *New Hampshire v. Maine*, 532 U.S. 742, 756 (2001) (No. 130, Orig.) (deciding case without appointing a special master by applying judicial estoppel based on New Hampshire’s position in the 1970s in No. 64, Orig.).

One last procedural issue warrants comment. As stated above, New Jersey believes it has proceeded properly by filing a motion to reopen in order to seek a supplemental decree pursuant to the Court’s continuing jurisdiction retained in paragraph 5 of the 1935 Decree. However, if the Court were to determine that New Jersey instead should have filed a new Bill of Complaint, then New Jersey respectfully requests that the Court treat the Petition for Supplemental Decree as New Jersey’s Bill of Complaint and allow New Jersey to proceed on the basis of the papers filed here.

## CONCLUSION

New Jersey requests that the Court grant it leave to reopen No. 11, Original, to seek a supplemental decree. New Jersey’s proposed Supplemental Decree is found at App. 269a.

The Court should direct Delaware to file its brief in opposition to New Jersey’s petition for a supplemental decree, allow New Jersey to file a reply, and set the case for argument in the October 2005 Term.

The Court should then declare that Article VII of the Compact of 1905 grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, free of regulation by Delaware, and the Court should enjoin Delaware from interfering with the exercise of New Jersey's riparian jurisdiction.

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